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No. 90-1903

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT G. AALGAARD, *Petitioner*

v.

MERCHANTS NATIONAL BANK, INC.,
THOMAS BOLTON, JR., LOUIS FAVRE, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an action against a national bank with less than twenty (20) employees, for age discrimination under the California Fair Employment and Housing Act, is preempted by the National Bank Act. [12 USC § 24 (Fifth)]

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RESPONDENTS' BRIEF IN OPPOSITION

I

OPINIONS BELOW

The decision of the Court of Appeal of the State of California, Third Appellate District is cited at 224 Cal.App. 3d 674 (1990). The California Supreme Court Order denying review was filed on January 4, 1991.

II

JURISDICTION

The judgment of the Court of Appeals of the State of California, Third Appellate District, was entered on October 10, 1990. A timely Petition for Review by the California State Supreme Court was denied on January 4, 1991. The Petition for Writ of Certiorari was filed on April 19, 1991. The jurisdiction of this Court is invoked under 29 U.S.C. § 2101(c).

III

STATUTES INVOLVED IN THIS CASE

1. 12 U.S.C. § 24 (Fifth). Corporate powers of associations.

2. California Government Code § 12941. Discrimination on basis of age.

IV

STATEMENT OF THE CASE

In January of 1956, at the age of twenty-seven (27), the Petitioner, ROBERT G. AALGAARD, was hired by the Respondent, MERCHANTS NATIONAL BANK, INC.[1] AALGAARD began as a clerk in the transit department and received routine promotions throughout the years until his last promotion in 1978 when he was made cashier of the Bank.

The last few years of the Petitioner's employment were checkered with frequent warnings regarding his job performance, which is reflected by a lack of pay increases. Although he promised on several occasions to improve his performance and even admitted to a lack of initiative, no marked improvement was observed during his last three (3) years of employment, and ultimately, the Board of Directors decided to terminate his employment in November of 1985. As a result of his termination, he filed a complaint for wrongful termination, grounded less specifically in age discrimination.

In November of 1988, Petitioners' Motion for Summary Judgment was granted. Since that time, AALGAARD has availed himself of every appellate opportunity and has been unsuccessful at every turn.

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[1]Supreme Court Rule 29.1, there is no parent or subsidiary company in reference to MERCHANTS NATIONAL BANK, INC., to be listed.

Contrary to what Petitioner states is the issue, the real issue here is whether an action against a national bank with less than twenty (20) employees, for age discrimination under the California Fair Employment and Housing Act, is preempted by the National Bank Act [12 U.S.C. § 24 (Fifth)].

V

ARGUMENT

The decision of the Court below is correct. It does not conflict with any decision of this Court, or with the decision of any other federal court of appeal or California cases. Accordingly, review by this Court is unwarranted.

A. THE COURT OF APPEAL'S OPINION IS NARROWLY TAILORED AND SUPPORTED BY EXISTING CASE LAW.

The Court of Appeal's decision should be upheld as it conforms to existing case law and is narrowly tailored due to the fact that it only affects a small number of employees in the State of California.[2] The decision specifically addresses the issue of age discrimination complaints filed by officers of national banks with less than twenty (20) employees. The holding is limited to these small banks, and certainly would not deprive "thousands of California citizens of the protection afforded by California's anti-discrimination and anti-retaliation statute," as claimed by Plaintiff. Petitioner's attempt to broaden the scope and import of this case is misleading. This case has absolutely nothing to do with race or sex discrimination, and the Appellate Court's decision was narrow and precise: "Since the State age discrimination statute cannot be constitutionally applied to national banks, it follows that the trial courts did not err in granting summary judgment in favor of both the bank and the individual defendants." [3]

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[2]Only thirty (30) national banks in California have less than twenty (20) employees. Of this total number, 140 are employed as officers, subjecting them to the restraints of this decision.

[3]Court of Appeal's Decision as contained in Petitioner's Appendix at page A-25.

The issue on appeal is the "at pleasure" language contained within the Federal National Bank Act as contained in Section 24 (Fifth) of the National Bank Act. That Act, whose precise language is noted in the Appendix to Petitioner's Brief at page A-1, states that national banks shall have the power to:

> . . . elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places. (Emphasis added.)

This provision of the National Bank Act is clear on its face and allows national banks to dismiss bank officers for any reason without incurring liability under state law for doing so. *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520, 524-526 (9th Cir. 1989); *Morast v. Lance*, 631 F.Supp. 474, 484 (N.D. Ga. 1986), *aff'd.*, 807 F.2d 926 (11th Cir. 1987); and *Kozlowsky v. Westminster Nat. Bank*, 6 Cal.App.3d 593, 596-597; 86 Cal.Rptr. 52 (1970).[4]

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[4]*See also, Inglis v. Feinerman*, 701 F.2d 97, 98-99 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (interpreting identical language in Federal Home Loan Bank Act [12 U.S.C. § 1432 (a)]); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1097-1098 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (interpreting identical language in Federal Reserve Bank Act [12 U.S.C. § 341 (Fifth)]); *Little v. Federal Reserve Bank of Cleveland*, 601 F.Supp. 1372, 1374-1377 (N.D. Ohio 1985) (Federal Reserve Bank Act); *Obradovich v. Federal Reserve Bank of New York*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983).

The case of *Ana Leon T. v. Federal Reserve Bank*, 823 F.2d 928 (6th Cir. 1987), is an example of an excellent case where the federal court found that state anti-discrimination cases cannot proceed in light of federal law. In *Leon*, the court found that as an employee of a federal reserve bank, plaintiff's rights were preempted by federal law. That court correctly noted that the federal law in question, which also mandates that employees may be dismissed "at pleasure", preempted any state-created employment right to the contrary. The same reasoning was applied to the similar case of *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp. 95 (S.D.N.Y. 1989).[5]

Petitioner in his brief has not proffered any case which may be cited that is on point in his favor. We are certain that this is not for lack of research, but rather because the myriad of cases on this matter are favorable to Respondents' position.

Petitioner does cite the cases of *Yellow Freight Systems, Inc. v. Donnelly*, 110 S. Ct. 1566 (1990) and *In Re: Sweeney*, 113 B.R. 359 (1990). Neither of these cases is on point or relevant to the case at bar. In *Yellow Freight*, the court simply said that federal courts do not have exclusive jurisdiction over Title VII actions, and cases could be tried in either federal or state court. That has never been an issue in this case.

On page 13 of Petitioner's Brief, he states, "The court in *Sweeney* stated that Section 24 (Fifth) of the National Bank Act must be construed and harmonized with the dictates of the more recent A.D.E.A. which precludes discrimination (*Sweeney, Id.* at 364)" (emphasis added). This is not what *Sweeney* says, but rather, "Provisions of the National Bank Act derived from the National Bank Act of 1864 and enacted in 1922, must be construed and harmonized with the dictates of the more recent *Bankruptcy Code Section 525 (b)* which precludes discrimination." (Emphasis added.)

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[5]The Federal Reserve Act [12 U.S.C. § 341 (Fifth)], and the Federal Loan Bank Act [12 U.S.C. § 1432 (a)], while differing slightly from the National Bank Act in dismissal language, nonetheless have been treated similarly if the procedural elements have been complied with. All three acts have "dismissal at pleasure" language.

Not even Mr. Chiurazzi's word wrench can make *Sweeney* relevant to the case at bar. *Sweeney* dealt with the Federal Bankruptcy Act versus the National Bank Act - federal law versus federal law. No such issue is presented here.

B. THERE IS A CONFLICT BETWEEN THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT AND THE NATIONAL BANK ACT.

California law prohibits dismissals on the basis of age. The National Bank Act permits dismissals at pleasure. To submit that these two laws can co-exist in the same arena is an absurdity.

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Fidelity Federal S. & L. Assn. v de la Cuesta, 458 U.S. 141, 152-153 (1982).

The issue presented here is not whether national banks can ever be subject to legislation designed to eradicate discrimination or otherwise reprehensible employment practices. Rather, the issue is simply which legislative body has the power to redefine and limit the otherwise absolute right national banks have under the National Bank Act to discharge bank officers for any reason. Clearly, that power resides in Congress, not the state legislatures. "Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell,* 402 U.S. 637, 652 (1971).

C. THERE IS NO CONFLICT BETWEEN 12 U.S.C. § 24 (FIFTH) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The Age Discrimination in Employment Act affects employers employing more than twenty (20) persons [29 U.S.C. § 623, 630, subd. (a) and (b)]. At all relevant times, Respondent Bank employed less than twenty (20) employees. Since the Age Discrimination in Employment Act does not apply to Respondent Bank, there is no conflict.

This case quite simply comes down to which law is going to prevail, federal or state. The matter has been decided time and time again in favor of the federal law under the Supremacy Clause.

VI

VI

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

DATED: _____ , 1991.

Respectfully submitted,

_____

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